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PETITION FOR CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO:_____

RICHARD DILLON,

Petitioner

V

STATE OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

TO THE INDIANA SUPREME COURT

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RICHARD DILLON, Petitioner,	)	
VS	)	CAUSE NO: _____
STATE OF INDIANA, Respondent	)	

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	11
Appendix	12-35

AUTHORITIES CITED

Cuyler v. Sullivan, 446 U.S. 335 (1980)	5
Dunaway v. State, 442 U.S. 200 (1979)	6, 7, 8, 9
Johnson v. Zerbst, 304 U.S. 458 (1938)	5
Kemp v. Leggett, 635 F. 2d 453 (5th Cir. 1981)	5
Powell v. Alabama, 287 U.S. 45 (1983)	5
Reina v. United States, 364 U.S. 507 (1960)	10
Stanley v. Zant, 697 F. 2d 955 (11th Cir. 1983)	5
Tollett v. Henderson, 411 U.S. 258 (1973)	6
United States v. Mendenall, 446 U.S. 544 (1980)	9
In re Winship, 397 U.S.358 (1970)	11

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

The petitioner, Richard Dillon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Supreme Court entered in this proceeding on October 3, 1983, rehearing denied November 22, 1983, wherein petitioner was sentenced to Death.

OPINIONS BELOW

A. The Opinion of the Indiana Supreme Court (Appendix A infra, pp. 12-30) is reported in 454 N.E. 2d 845. The denial of petitioner's timely Petition for Rehearing, without opinion, is reported at (unreported) (Appendix B , infra, pp. 31). The opinion of the Superior Court, Knox County, convicting petitioner of four counts of Murder, one count of Burglary and one count of Conspiracy, (Appendix C infra, pp. 32-34) appears at Rec. Vol. 2, p. 486.

JURISDICTION

A. The judgment of the Indiana Supreme Court was entered on October 3, 1981 (infra, Appendix A pp. 12-30).

B. The petitioner's timely Petition for rehearing was denied by the Indiana Supreme Court on November 22, 1983 (infra, Appendix B , pp. 31).

C. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 and Rule 17 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW

A. Whether, in a capital case where: petitioner's trial counsel advised the court of his incompetence to continue petitioner's defense; the trial court overruled a related continuance motion because of incompetence; petitioner's counsel filed an affidavit of incompetence subsequent to trial; and counsel failed to tender any final jury instructions, petitioner received effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

B. Whether the constitutional prohibition of confessions taken during an illegal seizure, as enunciated in Dunaway v. State, 442 U.S. 200 (1979), and related decisions, are abrogated by the mere assertion of the police officers that a suspect is free to leave and the suspect's cooperation was obtained with the intent to obtain a confession, even though all other incidents of arrest are present?

C. Whether the Fifth and Fourteenth Amendment guarantee against self-incrimination is violated by allowing a defendant's testimony during the guilt portion of a capital case to be used during the penalty portion of such bifurcated trial, pursuant to a state death penalty statute?

D. Whether the Sixth and Fourteenth Amendment guarantee

of due process of law is violated by a sentencing judgment imposing the death penalty under a state's death penalty statute, without a specific finding that the trial judge was persuaded beyond a reasonable doubt that aggravating circumstances, enumerated by statute, had been proved?

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Fourth Amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....

B. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law....

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense.

D. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]o state shall...deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

This is an action wherein petitioner was convicted of Murder, Burglary and Conspiracy in the Knox Superior Court, Knox County, Indiana (Rec. V. 2, pp. 466, 471, 476, 482-86; V. 8, p. 2072). Petitioner was sentenced to death pursuant to the Indiana Death Penalty Statute, Indiana Code §35-50-2-9 (Burns 1978) (Rec. V.2, pp. 477, 482, 484, 486)(Appendix D p. 35 , infra).

Petitioner was originally charged in the Pike Circuit Court, Pike County, Indiana, with multiple counts of Murder, Burglary and Conspiracy (Rec. V. 1, pp. 21-33; 382-87). The cause was venued to the Knox Superior Court (Rec. V. 1, pp. 69-80). Two Death Penalty requests were filed by the State of Indiana (Rec. V.1, pp. 88-89).

Petitioner filed a Motion to Suppress certain statements he made to police prior to trial (Rec. V.1, p. 141). This motion was denied (Rec. V.1, p. 223). The motion to suppress was based upon the manner in which petitioner was detained and questioned.

The police determined petitioner was not telling the truth during the early investigation of the crime (Rec. V.3, pp.646-59; V.4, pp. 782-83, 813-14; V.7, pp.1626-29, 1643, 1705, 1716, 1735; V.8, pp. 1858-59). Petitioner was considered a prime suspect (Rec. V.4, p. 787; V.7, p. 1719). Petitioner was taken by police to the Pike County, Indiana, jail without being placed under arrest (Rec. V. 3, pp. 643-54). Petitioner was questioned by the police for four hours (Rec. V.3, pp. 659-63; V.4, p. 778; V.8, pp.1855-56). During questioning he gave incriminating statements. While questioned petitioner was held in an interrogation room isolated from his family (Rec. V.4, pp. 872-75, 889-90).

C. While questioning petitioner the police used evidence they obtained from an alleged accomplice to verify petitioner's story (Rec. V. 7, pp. 1637, 1640, 1715). Prior to questioning a police officer had placed petitioner near the crime scene at the time of the murders (Rec. V.3, p. 655; V. 7, pp. 1605-19). The police admitted that they knew petitioner was somehow connected with the crime and they believed prior to the March 12 questioning, he was close to revealing this connection (Rec. V.8, pp.1858-59). At least five police officers were at the jail to check petitioner's statements as he made them (Rec. V.4, pp. 788-89).

Immediately prior to trial, petitioner's attorney informed the trial court that, for various personal and professional reasons, counsel was not competent to continue representing petitioner (Rec. V.3, p. 638). Trial counsel moved to continue the murder trial because of his lack of preparation (Rec. V.1, p. 211). Trial counsel confirmed to that point petitioner had been provided with incompetent counsel (Rec. V.3, p. 638). The trial court refused to grant a continuance (Rec. V.3, p. 641).

During the trial, petitioner's attorney failed to present any final jury instructions to the court (Rec. V.2, p. 464). After trial, petitioner's counsel filed an affidavit stating he had not been competent to try petitioner's murder case because of inadequate preparation, personal problems and incompetence (Rec. V.1, p. 6). The State agreed that trial counsel's problems were genuine (Rec. V. 1, pp. 16-17; V.3, p. 632-37).

Petitioner was found guilty. Under the Indiana Death Penalty Statute, Indiana Code §35-50-2-0 (Burns 1978) the same jury heard the sentencing portion of the trial. At the sentencing hearing the State introduced petitioner's trial testimony into evidence (Rec. V.2, p. 473).

The trial judge accepted the jury's recommendation to impose the death penalty (Rec. V.2, p. 486). In its finding, the trial court did not find that statutorily enumerated, aggravating circumstances existed beyond a reasonable doubt (Rec. V. 2, p. 486; Appendix A, infra, p. 29).

REASONS FOR GRANTING THE WRIT

A. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

This case presents a novel set of facts with regard to ineffective assistance of counsel. Although this Court has left the standard for effective counsel largely to the lower courts, it has set general standards.

Criminal trials cannot be conducted requiring the accused to defend without adequate legal representation. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Representation which competently and zealously presents defenses and safeguards an accused's rights is deemed effective. Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

Two cases are closely analogous to the instant case. In Kemp v. Leggett, 635 F. 2d 453 (5th Cir. 1981), the court found ineffective counsel where, inter alia, trial counsel filed an affidavit of incompetency. Id. at 454. This was also a murder trial.

Citing Kemp, supra, the court in Stanley v. Zant, 697 F. 2d 955 (11th Cir. 1983), held that where preparation for a murder trial was not adequate, effective counsel is lacking. Id. at 966. There are striking similarities between these latter two cases and the instant case.

Petitioner's trial counsel requested a continuance because of a lack of preparation. Counsel informed the trial court, prior to trial, that he had not done certain necessary things and was not competent to proceed with the petitioner's defense. Counsel stated that, "I (petitioner's counsel) realize that the defendant has not had competent counsel." (Rec. V.3, p. 638). The petitioner's trial attorney moved for a continuance, or in the alternative leave to withdraw.

Later, trial counsel filed an affidavit, as did the attorney in Kemp v. Leggett, supra, admitting to his lack of preparation and incompetence. The Indiana Supreme Court, in rejecting

the ineffective counsel argument, pointed to petitioner's acquiescence in his attorney's actions and to a weekend continuance granted to petitioner for further preparation. Petitioner urges here, as he did below, that the mere fact trial counsel would make a representation of incompetency to the court and file an affidavit stating he was not competent, in a case where the ultimate punishment may be the accused's death, requires a critical look at the actions of counsel. A defendant's acquiescence, or a two day continuance, in a murder trial, are not a prima facia cure for actions such as those of petitioner's counsel.

In examining the trial record it is found that petitioner's trial attorney failed to submit any final jury instructions to the court and only generally objected to any of the State's instructions. The Indiana Supreme Court found that, although this as a practical matter waives all error, it did not indicate a lack of effectiveness by trial counsel.

In examining reported cases individually and in a compilation, see e.g., 3 A.L.R. 4th 601 §§20, 22 (1981), there are many capital cases where harmles error is found in the omission of certain instructions in a criminal trial. However, no case was found where all instructions were omitted by a defense counsel in a capital case. This Court, in Tollett v. Henderson, 411 U.S. 258 (1973), held that the advice of an attorney to not submit instructions may be "outside the 'range of competence demanded of attorneys in criminal cases'." Id. at 268.

By finding petitioner's trial defense competent, the Indiana Supreme Court denied petitioner the protection of the Sixth and Fourteenth Amendments. The burden to recognize incompetent or ineffective counsel, in the face of statements by an attorney admitting these defects, is here placed upon a defendant. This burden is inappropriate in any criminal case and an impossible, unconscienable burden in a capital case.

B. THE INDIANA SUPREME COURT ABROGATED PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY CONDONING POLICE QUESTIONING AFTER AN ILLEGAL DETENTION MERELY BECAUSE THE DETENTION BEGAN IN A VOLUNTARY, ALBEIT PURPOSEFUL, MANNER.

Petitioner contended that the statements he gave to the police after his illegal detention should have been suppressed as the fruits of the illegality pursuant to Dunaway v. State, 442 U.S. 200 (1979). In rejecting this contention, the Indiana Supreme Court reasoned that the petitioner originally accompanied the police voluntarily and was not treated as a suspect or

arrestee. These superficial indices supported the contention that petitioner's statements were voluntary and not the product of an illegal detention.

In Dunaway, supra, the Court considered the legality of custodial questioning on less than probable cause for a full fledged arrest. The police, acting on a source insufficient in itself as a basis for probable cause, detained the defendant. Defendant was taken to the police station, placed in an interrogation room and waived his Miranda rights. The Court held that the subsequent confession obtained by the police was inadmissible as evidence because it resulted from an illegal detention. In effect, the police detention amounted to an illegal seizure without probable cause. The detention in Dunaway was, on its face, voluntarily submitted to by the defendant.

The petitioner urges that by making the same finding of voluntariness the Indiana Supreme Court ignored the purpose and thrust of the police behavior. The behavior violated petitioner's Fourth and Fourteenth Amendment rights.

In the instant case, police had questioned petitioner at his work on March 10, 1981, and at home on March 11, 1981. A suspected accomplice was questioned by the police on March 12, 1981, along with a physical search of the suspected accomplices' vehicle. This latter search yielded physical evidence prior to petitioner's detention.

Before March 12, 1981, the police determined petitioner was not telling the truth and was involved in the crime. The police investigation had focused upon petitioner. A policeman placed petitioner near the scene of the murders. Further, the police told the suspected accomplice that they knew of petitioner's involvment in the crime (Rec. V.4, pp. 830, 839). Police had other physical evidence to link petitioner to the crime (Rec. V.7, pp.1647-58). Prior to the March 12 detention petitioner was a prime suspect, not a mere witness as the police contend.

If no probable cause existed for an arrest, then the conduct of the police amounted to an illegal detention. If probable cause did exist prior to the March 12 detention, then a warrant was necessary and any statements obtained during the detention are tainted.

The Indiana Supreme Court found the detention to be voluntary. The police advised petitioner they only wanted to talk to him in a quiet place (Rec. V. 4, p. 779). Petitioner's parents were told he would be returned home (Rec. V. 4, p. 872). This

conduct dissarmed both petitioner and his parents. This is what it was intended to do. Armed with the knowledge of petitioner's complicity, the police formed only one strategy: get the petitioner alone, isolated, and obtain a confession. One officer states that, because of the information he had obtained earlier, it was his feeling that petitioner would ultimately confess.

A request, rather than a demand, to come to the police station does not necessarily turn an arrest into a voluntary trip. This request by the police easily carries with it the "implication of obligation" to the ordinary citizen Dunaway v. State, supra, at 207, n. 6. Dunaway established guideposts in distinguishing arrests from voluntary questioning: (1) Why was the person not questioned briefly where he was found?; (2) Was he taken away by the police in a police car?; (3) Was he taken to a police station, or to jail?; (4) Was he placed in an interrogation room?; (5) Was he informed that he was free to leave at any time? Id.

In the instant case petitioner was taken by the police to jail. He was placed in an interrogation room, isolated from his family (Rec. V.4, pp. 872-90). A minimum of five police officers were present during his questioning. Two tape recorders were waiting to get his confession (Rec. V.3, pp. 657-65). The entire course of conduct prior to his detention, and once inside the jail, was designed to elicit petitioner's confession.

Petitioner was accused of lying. The police said they had incriminating evidence in their possession (Rec. V.4, p. 857; V.8, p. 1868). Subsequent to an initial statement, the police continued to confront petitioner with inconsistencies and threats of lie detector tests. The police were in a position to instantly check information petitioner gave them with other policemen at the jail. Petitioner was confronted by the prosecutor during his interrogation (Rec. V.3, p. 662, 735-36).

The police conduct surrounding petitioner's statements clearly fails the Dunaway test. There was sufficient causal connection between the illegal detention and the statement to defeat any allegation that the Miranda waiver and voluntary aspect of the questioning attenuated the unconstitutional aspect of the search.

The confession followed the detention by approximately four hours. There were no intervening circumstances, other than police conduct to gain a confession and a discussion with the prosecutor, to break the causal connection. Without question,

the purpose of the detention was to get a confession from petitioner: an "expedition for evidence" in hope something might develop. Dunaway, supra, at 218. The apparent lack of threats or abuse, or the protection of Fifth and Sixth Amendment rights by the police, relied upon by the Indiana Supreme Court only go to the issue of voluntariness. These factors do not constitute an intervening event that would take this case out of the purview of Dunaway.

United States v. Mendenhall, 446 U.S. 544 (1980), and its associated cases, are easily distinguishable from the instant case. In Mendenhall the defendant was searched in a public place, an airport, and was taken to the police station only after illegal drugs were found. The place of detention was found to weigh heavily on the issue of whether the defendant voluntarily submitted herself to the search.

When the petitioner was removed to the police station this indicia of voluntariness vanished. This course of conduct, although not comfortably within the traditional concept of an arrest, is a "serious intrusion upon the sanctity of the person." Dunaway, supra. There is nothing that stops the police from questioning a suspect at home, work, or on the street if the only motive is police investigation. Id. at 210, n. 12.

There is a traditional hostility to searches and seizures based upon mere suspicion. The Indiana Supreme Court decision abrogates petitioner's Fourth and Fourteenth Amendment rights. Custodial interrogation, no matter what it is called, invokes these Amendments' safeguards. According to the police officers' testimony, the purpose of the unconstitutional arrest was to get the petitioner to confess. They had linked petitioner to the crime prior to this custodial questioning. Therefore, the applicationof the Fourth and Fourteenth Amendment consideration in Dunaway is necessary.

C. THE INDIANA DEATH PENALTY STATUTE AND ITS APPLICATION IN THIS CASE, VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

The Indiana Death Penalty Statute, Indiana Code §35-50-2-9 (Burns 1978) (Appendix D , infra, p. 35) provides, in pertinent part, that during the sentencing portion of a bifurcated murder trial: "The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings...at the sentencing hearing." As a matter of practical application, as was the

problem in the instant case, a defendant's testimony during the guilt portion of the trial can be introduced during the equally as critical sentencing portion of a death penalty case.

At trial, petitioner chose to testify during the guilt portion of the trial. However, prior to petitioner presenting any evidence during the sentencing portion, the State's motion to incorporate all trial testimony in the sentencing hearing was granted. Subsequently, the petitioner testified. Arguably, this was in response to the Fifth Amendment waiver that had been forced upon him by the Indiana Statute and the trial court.

The Indiana Supreme Court disposes of this constitutional issue in three ways. The Court found that to avoid the use of his trial testimony at the sentencing hearing the petitioner should have refused to testify at the guilt portion. Placing the burden on the State to prove beyond a reasonable doubt the existence of aggravating circumstances also, according to the Indiana Supreme Court, safeguards petitioner's constitutional rights. The Court further found that fundamental fairness and due process are protected during the sentencing portion of the trial because the customary evidentiary rules apply to the sentencing proceeding.

This interpretation violates petitioner's right to be secure against self-incrimination. This Court clearly stated the general principal in Reina v. United States 364 U.S. 507 (1960): The constitutional protection no longer attaches after an accused testifies because the accused can no longer be incriminated by the former testimony. This presents no problem as long as the testimony relates only to the crime in question. However, in the instant case, the petitioner is forced to choose during the guilt portion whether he wants to waive his self-incrimination right. In addition to this critical decision, the petitioner must also weigh his option to testify with the added burden of knowing that his choice will carry a waiver of his Fifth Amendment right with respect to the death penalty portion of the trial. This is not the type of incrimination dealt with in Reina.

Forcing the petitioner to waive his Fifth Amendment protection in the guilt portion violates due process and fundamental fairness. In a death penalty case an accused, facing a possible death sentence, should not be hamstrung in his defense by this type of choice. Contrary to the Indiana Supreme Court's opinion, Petitioner urges that the constitutional evidenciary protections do not attach under the Indiana death penalty procedure. The

statute violates the Fifth and Fourteenth Amendments in both its terms and application.

C. FAILURE TO FIND THAT CERTAIN AGGRAVATING CIRCUMSTANCES OCCURRED, BEYOND A REASONABLE DOUBT, VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT

To prevent the discriminatory and arbitrary imposition of the death penalty, the Indiana Death Penalty Statute, supra, provides that the judge shall make the final determination of whether to impose death "based on the same standards that the jury was required to consider." The due process clause of the Fifth and Fourteenth Amendments prohibits deprivation of life by the state without proof beyond a reasonable doubt "of every fact necessary to constitute the crime." In re Winship, 397 U.S. 358, 364 (1970).

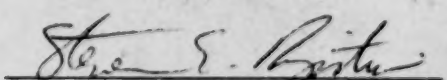
In the trial judge's order and finding of fact sentencing Petitioner to death, there is no direct statement that the judge was persuaded beyond a reasonable doubt that the Petitioner was guilty of murder and intentionally killing either victim (infra, Appendix A , p. 29). The Court's failure to find the facts necessary to impose the death penalty, beyond a reasonable doubt, deprived petitioner of his due process rights. A minority on the Indiana Supreme Court recognized this. Petitioner urges that to hold otherwise deprives petitioner of the due process safeguards.

CONCLUSION

For the reasons set forth herein, individually or in the alternative, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the Supreme Court of Indiana entered herein.

Dated:

Respectfully submitted,
LYTTON AND RIPSTRA



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IN THE

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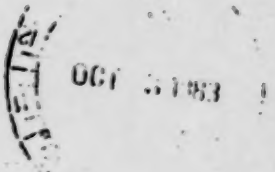


RICHARD DILLON,
Appellant (Defendant below),

v.

STATE OF INDIANA,
Appellee (Plaintiff below).

No. 282 S 67

APPEAL FROM THE KNOX SUPERIOR COURT

THE HONORABLE EDWARD C. THEOBALD, JUDGE

HUNTER, J.

The defendant, Richard Dillon, was convicted by a jury of two counts of felony murder, Ind. Code § 35-42-1-1 (2) (Burns 1979 Repl.), one count of burglary, a Class A felony, Ind. Code § 35-43-2-1 (Burns 1979 Repl.), and one count of conspiracy to commit burglary, a Class A felony, Ind. Code § 35-41-5-2 (Burns 1979 Repl.). The jury also recommended that a sentence of death be imposed upon defendant, Ind. Code § 35-50-2-9 (Burns 1979 Repl.), and defendant was thereafter sentenced to death by the trial court.

His direct appeal challenges the legality of the death sentence and presents the following issues for our review:

1. Whether the defendant was denied effective assistance of counsel at trial;

2. Whether the trial court erred in denying defendant's motion to suppress his inculpatory statement; and

3. Whether Indiana's death penalty statute is unconstitutional as violative of due process.

A brief summary of the facts from the record most favorable to the state shows that William and Mary Hilborn were found stabbed to death in their home in Petersburg, Indiana, on March 8, 1981. Defendant was observed walking in the vicinity of the Hilborns' property around the time of the murders by a deputy sheriff. He was questioned by the police at work on March 10, 1981, and at his home on March 11, 1981. He denied being in Petersburg at the time of the murders and said he had been in Princeton, Indiana, with a friend, J. R. Thompson. A knife which was identified as the murder weapon was found in Thompson's car. On March 12, 1981, the police asked defendant if he would go with them to the sheriff's office to clear up some discrepancies concerning his actions on March 8. Defendant voluntarily accompanied the officers to the sheriff's office. He signed two waiver of rights forms and gave two statements, the second of which was a confession.

I.

Defendant first alleges that he was denied the effective assistance of counsel at his trial. On July 7, 1981, approximately two weeks prior to the trial, the court held a hearing on defendant's motion to suppress. At this time his retained counsel filed a motion for postponement and continuance which reads in pertinent part:

> "1. That counsel for the defendant may have not had the presence of mind to effectively represent the defendant during the course of the pre-trial proceedings, due to personal problems, to-wit:
>
> > "a. On April 15, 1981, during the course of pre-trial proceedings, counsel for the defense was divorced from his wife of eleven (11) years, which divorce was the desire of counsel's wife, and against said counsel's wishes.

"b. On April 18, 1981, counsel's brother, Ronald D. Fulcher, was seriously injured in a motorcycle accident, in Knox County, and remains paralyzed in the Veterans Hospital in Hines, Illinois at this date.

"c. That on Sunday, July 5, 1981, counsel's Father, Randall R. Fulcher, was rushed to the Veterans Hospital in Indianapolis, Indiana and on Monday July 6, 1981 underwent eleven hours of emergency heart surgery and at this date remains in an unconcious [sic] state, in serious condition.

"2. That the State continues daily to provide the defendant with new items of discovery, despite statements prior thereto that discovery is; complete, and such new discovery has led the defendant to new avenues of defense which defendant should pursue, to provide an adequate defense.

"3. That the course of the investigation by defense has turned up possible new evidence, which could not have been discovered in the short period of time allowed for pre-trial proceedings.

"WHEREFORE, defendant respectfully submits to this Court that to proceed with the trial as scheduled, after such a short period of time for preparation of its defense would effectively deprive defendant of its right to a fair trial, and that to proceed with hearings and trial as scheduled while defendant's counsel is having personal problems, and immediately after defense counsel's other personal problems would effectively deny the defendant of the right to competent counsel."

The hearing was continued on July 8, 1981, and the trial court specifically asked defendant if he was aware of his attorney's personal problems and if he wanted his attorney to withdraw. Defendant answered that he was aware of the circumstances but that he did not wish the attorney to withdraw. The court reminded the attorney that it was the court's duty to determine whether or not an attorney was competent to represent a defendant. Here the attorney had been hired four months prior to the trial. The court also said he had considered all the hours of preparation which had already been spent by both parties on this case, the fact that witnesses had been subpoenaed, jury panel members had been notified, and the court's calendar for the next six months was extremely congested so any delay at that time would mean a long postponement for the trial. After hearing further arguments by both sides, the court denied both the motion to suppress and the motion for a continuance. However, the record shows that after the jury had been selected the court did grant

a continuance so that counsel would have an extra weekend to prepare for the trial. The trial proceeded on Monday, July 20, 1981, without further objection by defendant or his counsel.

At the hearing on the motion to correct errors the trial counsel filed an affidavit stating that due to his personal problems he had not had time to adequately prepare for defendant's trial, that he felt he had not been competent to represent the defendant properly, and that he felt a new trial should be granted. The state filed counter affidavits which summarized many of the actions the attorney had taken in preparing for this trial, his conduct during the trial itself, and the times when the various personal problems arose in relation to the time of the trial. The court denied the motion to correct errors with the following findings:

> "The court finds that:
>
> "1. There was sufficient evidence before the jury from which they could find the defendant guilty beyond a reasonable doubt."
>
> "2. At the pre-trial hearing on defendant's motion to suppress, the court found that the statements of the defendant were admissible at trial. No new evidence was presented at trial which would have required a reversal of that ruling.
>
> "3. The Indiana Supreme Court has upheld the constitutionality of the death penalty statute.
>
> "4. On the first day of trial, prior to voir dire of the jury, defendant's attorney requested a continuance which was denied. He then offered to withdraw as counsel for defendant and defendant was given the opportunity to accept the withdrawal and have other counsel appointed. The defendant elected to continue with his hired counsel. Thereafter, defendant's attorney performed adequately during trial.
>
> "5. After the evidentiary part of the trial had begun, the defendant, outside the presence of the jury, attempted to enter a plea of guilty which was rejected because the court, based upon defendant's rendition of the facts, could not find a factual basis for the plea. The court immediately thereafter sequestered the jury.
>
> "Upon these findings the court denies defendant's motion to correct errors."

Defendant's argument of incompetency of counsel is based primarily upon the allegedly inadequate time his counsel had for preparation and the fact that counsel failed to tender any final instructions. Our law regarding the issue of competency of counsel is well settled. Counsel

is presumed to have prepared and executed his client's defense effectively, and strong and convincing evidence is required to rebut the presumption. Lindley v. State, (1981) ___ Ind. ___, 426 N.E. 2d 398; Rinard v. State, (1979) 271 Ind. 588, 394 N.E. 2d 160. Incompetency of counsel revolves around the particular facts of each case and the reviewing court will consider the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial. The standard of review is the mockery of justice test as modified by the adequate legal representation standard. Hollon v. State, (1980) ___ Ind. ___, 398 N.E. 2d 1273; Crisp v. State, (1979) 271 Ind. 534, 394 N.E. 2d 115; Cottingham v. State, (1978) 269 Ind. 261, 379 N.E. 2d 984.

A careful examination of the record in this case reveals the following facts: counsel entered his appearance for defendant approximately four months before the trial; his wife had filed for divorce one month prior to his entering his appearance in this cause; his divorce was final eighty-nine days before the trial; his brother's accident occurred eighty-five days before trial; and his father had been ill for some time prior to trial but did not die until forty-seven days after the trial began. Thus, while we appreciate the fact that counsel was experiencing unusual pressure during that pretrial period, his personal problems and trial preparation time were spread out over a period of months, and he had a reasonable amount of time to prepare for this trial.

Defendant also argues that his counsel's failure to tender any final instructions was an indication of his incompetence. We disagree. The record shows that defendant's trial counsel prepared and tendered to the court eleven proposed preliminary instructions, but these were either withdrawn or refused as covered by the court's own instructions. The trial court gave many of its own instructions, both preliminary and final, which were sufficient to cover the necessary points of law. Defendant does not point out now any way in which the trial court's instructions were improper or inadequate. Trial counsel's failure to tender instructions on issues which are adequately covered by the court's own instructions does not show incompetence. Leaver v. State, (1981) ___ Ind. ___, 414 N.E. 2d 959.

The record further shows many specific actions the attorney took on defendant's behalf both prior to and during the trial. Prior to trial, the attorney sought and was granted a change of venue from Pike County. He interviewed witnesses prior to trial, requested and was granted full discovery, viewed all of the state's physical evidence, read and copied the grand jury testimony, filed several pretrial motions, attended and offered evidence at pretrial hearings, attended omnibus hearings, subpoenaed and presented witnesses on defendant's behalf, consulted with the state's attorney several times prior to trial, viewed the list of prospective jurors, and consulted with the attorney representing defendant's accomplice. He visited defendant at least ten to fifteen times while he was in the Pike County jail and on four or five occasions in the jury room of the Pike Circuit Court, averaging forty to sixty minutes on each occasion. During the trial, counsel extensively cross-examined the state's witnesses, called witnesses on behalf of defendant, called defendant as a witness in his own behalf, and made timely objections and a lengthy closing argument to the jury.

In this case, there was evidence to show that defendant's trial counsel had rendered adequate assistance in both the pretrial phase and the trial itself and that he had presented a partial alibi defense for defendant in the face of substantial evidence to the contrary. He was well prepared for the trial and had an informed basis for making his trial strategy decisions. Furthermore, defendant has not presented any specific facts which demonstrate ineffective representation. The trial as a whole was not a mockery of justice. In fact, the record shows that defendant had vigorous representation in the face of overwhelming evidence, including his own confession, against him. The record does not show that defendant was denied effective assistance of counsel.

II.

Defendant next alleges that the trial court erred in admitting into evidence his inculpatory statements because they were the product of an unlawful detention. The facts surrounding the giving of these statements were brought out at the hearing on defendant's motion

to suppress. During the investigation of the instant crime, defendant had been questioned briefly two different times by police officers, once at his home and once at work. The police thought he might be a witness to the crime as he had been seen near the scene of the crime. The police questioned defendant's friend, J. R. Thompson, and found evidence in Thompson's car that indicated defendant might have been lying to them when he originally answered their questions.

At this point, on March 12, 1981, four days after the murders, two police officers went to defendant's home and saw his brother out in the yard. The brother called for defendant to come over to the car and the officers identified themselves and said they would like to talk to him. They asked defendant if he would come to the police station in order to talk about some of the things he had previously told them concerning events on the day of the murders. Defendant said, "Sure." Then defendant and one of the officers went into the house and told defendant's mother where they were going. Defendant got a jacket from his room. He rode to the station in the back seat of the police car. He was not handcuffed and was not under arrest or treated as a suspect. Both officers rode in the front of the car. The officers specifically testified that they told defendant he didn't have to come with them if he didn't want to, but he voluntarily agreed to go with them.

At the police station, defendant was taken to the sheriff's office which was furnished with a wooden desk, comfortable chairs, a bookcase and carpeting. He was given a waiver of rights form which he read and signed. He then gave a taped statement about his activities on March 8 in which he indicated that he had been with J. R. Thompson but hac not been in the vicinity of the crimes. The two police officers left the room and discussed what defendant had told them. They concluded that his statements were not truthful, in light of other information they had which showed that he had been seen by a deputy sheriff in the vicinity of the victims' home near the time the murders occurred. The officers returned to the room and told defendant they felt his statements were not truthful. Defendant was advised that they were discussing the crime of murder and

the possible penalties, but that the final decision on the charges to be filed was up to the prosecutor. Defendant never asked to have an attorney present but he wanted the prosecutor to be contacted so he would know what charges he would be facing. One of the officers left the room to call the prosecutor, who agreed to come to the sheriff's office. Then, defendant looked at the officer who was in the room with him and said, "Well, we did it," and started crying. The other officer returned to the room and defendant was again advised of his rights and signed a second waiver of rights form. He gave a second statement admitting his part in the murders.

After the second statement was given, the prosecutor and his deputy arrived and advised defendant of the possible criminal charges he faced. The entire period of questioning took approximately two and one-half hours. Defendant was free to leave at any time during this period and the doors to the office were not locked. He did not ask for any food and was given a soft drink. He was never threatened or physically abused and no promises of leniency were made. Defendant was not arrested until after he gave his taped confession and the following day he appeared before a magistrate all as provided by statute.

Defendant contends that he could not have voluntarily waived his rights as he had been smoking marijuana and took two Quaaludes on the day he was questioned. Defendant's mother testified that she and her husband went to the police station and asked to see defendant, but the officers wouldn't let them see him and just said they would tell them what happened. In rebuttal, Officer Nelson testified that in his opinion defendant was not under the influence of drugs at the time the statements were given. Officer Sibbitt testified that he did not recall defendant's parents asking to see their son but only that they inquired where he was and what was going on and then left the sheriff's office.

As a court of review, we review the question of the admissibility of a confession as we do other sufficiency matters. We do not weigh the evidence, but rather determine whether there was substantial evidence of probative value to support the trial court's finding. This is true even though conflicting evidence is presented on the issue of voluntariness

Long v. State, (1981) ___ Ind. ___, 422 N.E. 2d 284; Battle v. State, (1981) ___ Ind. ___, 415 N.E. 2d 39; Arch v. State, (1978) 269 Ind. 450, 381 N.E. 2d 465.

It is clear that if a confession is the product of an unlawful detention or an illegal arrest it is inadmissible. Dunaway v. New York, (1979) 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824; Brown v. Illinois, (1975) 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416. Triplett v. State, (1982) ___ Ind. ___, 437 N.E. 2d 468; Morris v. State, (1980) ___ Ind. ___, 399 N.E. 2d 740. However, it is also clear that not every police-citizen encounter amounts to a "seizure" of the person so that an arrest or unlawful detention has occurred. The test for determining whether a person has been "seized" for Fourth Amendment purposes is whether, considering all the circumstances surrounding the police-citizen encounter, the defendant entertained a reasonable belief that he was not free to leave. Dunaway v. State, (1982) ___ Ind. ___, 440 N.E. 2d 682; United States v. Mendenhall, (1980) 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (plurality opinion); Barber v. State, (1981) ___ Ind. App. ___, 418 N.E. 2d 563.

In this case, the facts are sufficient to show that defendant voluntarily accompanied the officers to the police station and gave two voluntary statements. The officers specifically told defendant he did not have to come with them if he didn't want to. He was not handcuffed or otherwise treated as a suspect or an arrestee and rode by himself in the back seat of the police car to the police station. He talked to the officers in the sheriff's private office with both doors unlocked and was not physically restrained, abused, or threatened. He was not unreasonably interrogated or deprived of food, water, or rest. Defendant admitted that he had not been threatened or coerced by the police and that he had signed the waiver of rights forms and given the statements. There was no promise of leniency. This was sufficient evidence to support the trial court's finding that defendant's confession was not the product of an illegal detention and was voluntarily given.

III.

Defendant finally argues that Indiana's death penalty statute violates due process and is unconstitutional in several respects. He first argues that our statute vests the trial judge with unlimited discretion in imposing the death penalty after a jury trial as the judge is not bound by the jury's recommendation or any other objective standards. There is no merit to this contention since the statute specifically states: "The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider." Ind. Code § 35-50-2-9 (e)(2) (emphasis added). He also argues that due process is violated because the trial judge can consider all evidence introduced during the trial at the sentencing hearing. He alleges that this allows the judge to consider inadmissible evidence presented to the court for rulings during the course of the trial as part of the basis for imposing the death penalty. Contrary to defendant's allegations, the statute does limit the type of evidence which may be considered during the sentencing hearing in the following manner: "The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing." Ind. Code § 35-50-2-9 (d) (emphasis added). Evidence which is introduced at trial is not inadmissible evidence. Furthermore, the court's reasons for imposing the death penalty must be stated in writing and are reviewed by this court to safeguard against the influence of improper or prejudicial factors at the trial level and to determine that there were no elements of arbitrariness or capriciousness in the sentencing decision.

Defendant further argues that his right against self-incrimination is violated since any testimony he gives during the trial on the underlying felony is also considered during the sentencing hearing. However, our statute clearly does not prevent an accused from exercising his right not to testify during the trial on the underlying felony. When testimony which defendant gave at trial is used again at the sentencing hearing, there is no violation of any constitutional right since the issue of guilt or innocence has already been determined. Furthermore, the state

bears the burden of proving the existence of at least one of the aggravating circumstances beyond a reasonable doubt before the death penalty can be imposed. Ind. Code § 35-50-2-9 (e).

Defendant also contends that the death penalty constitutes vindictive justice and therefore violates Article 1, Section 18 of the Constitution of the State of Indiana. He further contends that the provision for the same trier of fact to determine both the merits of the underlying felony and the applicability of the death penalty violates his right to due process. We have dealt with both these arguments in previous cases. We have consistently held that the death penalty does not offend Article 1, Section 18 of our state constitution and that our death penalty statute is not unconstitutional per se, as being in derogation of the Eighth Amendment to the United States Constitution. We have found that Article 1, Section 18 of the Indiana Constitution is an admonition to the legislative branch of the state government and is addressed to the public policy which the legislature must follow in formulating the penal code. It applies to the penal laws as a system to insure that these laws are framed upon the theory of reformation as well as the protection of society. Schiro v. State, (1983) ___ Ind. ___, 451 N.E. 2d1047; Williams v. State, (1982) ___ Ind. ___, 430 N.E. 2d 759, appeal dismissed, (1982) ___ U.S. ___, 103 S. Ct. 33, 74 L. Ed. 2d 47; Brewer v. State, (1981) ___ Ind. ___, 417 N.E. 2d 889, cert. denied, (1982) ___ U.S. ___, 102 S. Ct. 3510, 73 L. Ed. 2d 1384; Judy v. State, (1981) ___ Ind. ___, 416 N.E. 2d 95; French v. State, (1977) 266 Ind. 276, 362 N.E. 2d 834.

The procedural scheme set out in our statute limits the imposition of death sentences so as to insure that they will not be inflicted arbitrarily or capriciously in accord with the decisions and opinions of the United States Supreme Court. Gregg v. Georgia, (1976) 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859; Proffitt v. Florida, (1976) 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913; Jurek v. Texas, (1976) 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929. Although our statute provides that the same jury that made the guilt determination hears the sentencing portion of the trial, the adherence to the standard of proof beyond a reasonable doubt and the customary evidentiary rules insure that

fundamental fairness and due process are protected during the proceedings. Furthermore, the sentencing proceeding is not a separate guilt determination. Our statute provides that the death penalty may be imposed if the circumstances of the offense and the character of the offender both warrant; our death sentencing procedures are consistent with and in full compliance with the requirements set forth by the Supreme Court in Proffitt v. Florida, supra, and Gregg v. Georgia, supra.

We now turn to a review of the imposition of the death penalty in the instant case. A careful review of the record reveals that all of the statutory procedures were followed in the trial of this defendant. During the guilt determination phase of the proceedings, the jury found beyond a reasonable doubt that defendant conspired with another individual to commit burglary in the home of William and Mary Hilborn because they heard the Hilborns kept a large amount of money in their home. They carried out this plan by breaking and entering the residence with the intent to commit theft and were inside the house when the victims returned home. The testimony showed that defendant had an opportunity to leave the house before committing the murders, but decided it would be necessary to kill both the Hilborns so there wouldn't be any witnesses. Defendant was the person who actually stabbed the victims. The victims were an elderly couple and both were stabbed numerous times. Mrs. Hilborn was also slashed in several places on her neck and hand apparently in an effort to get her to tell where the money was hidden. She had a severe stab wound in her stomach and a fatal stab wound in her back which according to the doctor's testimony was received after she had already fallen to the floor. There was evidence that Mr. Hilborn had struggled with his assailant and tried to defend himself with a billy club. He also had a severe stab wound to the stomach and apparently received a fatal wound to his heart when he attempted to go to the aid of his wife. No money was found in the house even though the victims had cashed their monthly retirement check a few days earlier. The evidence clearly sustains the jury's finding that defendant intentionally killed both victims while committing the burglary.

A separate sentencing hearing was held following the guilt determination at which time defendant presented evidence in his own behalf. Proper and complete instructions were given at both phases of the trial. By a written, unanimous verdict, the jury returned a recommendation that defendant be sentenced to death. The trial judge then considered all the evidence in the case, the jury's recommendation, and the aggravating and mitigating circumstances before imposing the death penalty. He entered his written statement of findings and reasons for the imposition of the death penalty in accordance with the requirements of Ind. Code § 35-50-2-9. This written statement shows that the judge considered the specific facts of the instant crimes and the character of defendant. After a brief summary of the evidence in his written findings the judge stated:

> "Accordingly, the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder.
>
> "In reviewing the seven possible mitigating circumstances considered by the jury, the court finds:
>
> "1. The defendant had no significant history of prior criminal conduct. This is a mitigating circumstance which must be weighed against the aggravating circumstances.
>
> "2. There was no evidence that the defendant was under extreme mental or emotional disturbance when he committed the murders. The defendant's confession revealed that he was somewhat fearful of being apprehended for the burglary, however, that same confession also revealed that the defendant and his accomplice had nearly left the residence by way of the kitchen and then returned to the living room and bedroom where the killings took place.
>
> "3. The evidence shows that the victims were completely unaware that the defendant and his accomplice were inside the residence when they arrived at their home. Thus, the victims were not participants in nor did they consent to the defendant's conduct.
>
> "4. Juvenile proceedings have been instituted against the defendant's accomplice for his participation in these crimes. In his confession the defendant stated that he, the defendant, stabbed both of the victims. Thus, the defendant's participation in the murders was not minor.
>
> "5. There was no evidence that the defendant was under substantial domination of another person.

"6. The defendant did not file a plea of insanity nor did he file a plea alleging lack of comprehension. In his confession the defendant stated that he had consumed a small quantity of controlled substances on the day of the murders and that he was high. The testimony of witnesses detailing the defendant's actions shortly after the killings show that his thinking was clear and was well aware of what had occurred. The evidence fails to substantiate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired as a result of mental disease or defect or of intoxication.

"7. As to any other circumstances appropriate for consideration, the only other circumstance which might be considered is the defendant's age of 18 years. This is not necessarily to be considered as a mitigating circumstance, particularly in view of the obvious torture inflicted upon at least one of the victims prior to the final fatal blow. The capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance.

"In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstance of no significant history of prior criminal conduct. Accordingly, the court finds the jury recommendation to be proper and lawful and that the court has a duty to follow such recommendation."

We have reviewed the written findings and reasons along with the evidence in the case and find that the record clearly supports the conclusion that the imposition of the death sentence was determined by the nature of the offense and the character of the offender. Two of the statutory aggravating circumstances were proved beyond a reasonable doubt and both the jury and the judge found that these aggravating circumstances outweighed the mitigating circumstance of no prior criminal history. We find that the trial court in all respects properly followed the required procedures in imposing the sentence of death. The evidence in the record supports our conclusion that the sentence of death was not arbitrarily or capriciously arrived at and is not manifestly unreasonable.

The judgment of the trial court is affirmed in all things; the cause is remanded to the trial court for the purpose of fixing a date for the death sentence to be carried out.

GIVAN, C.J., AND PIVARNIK, J., CONCUR.
DeBRULER, J., CONCURS AND DISSENTS WITH OPINION IN WHICH PRENTICE, J., CONCURS.

No. 282 S 67

IN THE

SUPREME COURT OF INDIANA

RICHARD DILLON,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

APPEAL FROM THE KNOX SUPERIOR COURT
THE HONORABLE EDWARD C. THEOBALD, JUDGE

DONALD H. HUNTER, JUSTICE

Judgment affirmed; cause remanded with instructions.

Clerk
Reporter
West

GIVAN, C.J., AND PIVARNIK, J., CONCUR.
DeBRULER, J., CONCURS AND DISSENTS WITH OPINION IN WHIC
PRENTICE, J., CONCURS.

SUPREME COURT OF INDIANA

RICHARD DILLON, Appellant,	)	
v.	)	NO. 282 S 67
STATE OF INDIANA, Appellee.	)	

APPEAL FROM KNOX SUPERIOR COURT
Honorable Edward C. Theobald, Judge

DeBRULER, J. - Concurring and Dissenting

Operations required to be performed by the jury and judge after the conclusion of a death sentencing hearing are set forth in Ind. Code § 35-50-2-9(e) which provides:

> "(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances. The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

According to this statute the "final determination of the sentence" is to be made by the judge by applying the same standards used by the jury in reaching its recommendation. The first standard to be applied by the judge is the trier-of-fact standard of proof beyond a reasonable doubt. One of the major goals of this sentencing process is to prevent the discriminatory and arbitrary imposition of the death penalty. Brewer v. State, (1982) ___ Ind. ___, 417 N.E.2d 889. This goal, under this statute, is in major part to be assured through the requirement that the judge, as trier of fact, be persuaded to a moral certainty beyond a reasonable doubt that an aggravating circumstance has been proven. In order to accomplish this essential operation, the judge must be in a trier-of-fact mindset and not a review or appellate mindset. Schiro v. State, (1983) ___ Ind. ___, 451 N.E.2d 1047, separate concurring and dissenting opinions

of [illegible], J., and Richie, C.J., without appellate enforcement of this requirement, the death judgment will be based upon an advisory jury verdict which is reveiwed for sufficiency of the evidence by the sentencing judge. That is no judgment at all. That would be totally at odds with the purpose of the layered statutory scheme to prevent the arbitrary and discriminatory imposition of the death penalty.

The finding and judgment of the sentencing court below is as follows:

> "The Court now enters finding and reasons for the imposition of the death penalty as recommended by the jury in this case as follows:
>
> The defendant, Richard Dillon, was found guilty of the killings of William Hilborn and Mary Hilborn during the commission of a burglary in the guilt determination stage of the trial.
>
> At the sentencing hearing, the burden was upon the State of Indiana to prove beyond a reasonable doubt that the murders were intentional and committed during the perpetration of a burglary as set forth in Counts VII and VIII of the charging information. The State moved to incorporate by reference the testimony presented in the first stage of the trial, which motion was granted. The testimony showed that the defendant and another broke and entered the Hilborn residence with the intent to commit the felony of theft. While the defendant and his cohort were inside the residence in the process of committing the burglary, William and Mary Hilborn returned to their home. The defendant and his accomplice, while in hiding inside the house, determined that it would be necessary to kill both William and Mary Hilborn in order to escape criminal prosecution and then carried out that plan. Accordingly, the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder.
>
> In reviewing the seven possible mitigating circumstances considered by the jury, the Court finds:
>
> 1. The defendant had no significant history of prior criminal conduct. This is a mitigating circumstances which must be weighed against the aggravating circumstances.
>
> 2. There was no evidence that the defendant was under extreme mental or emotional disturbance when he committed the murders. The defendant's confession revealed that he was somewhat fearful of being apprehended for the burglary however, that same confession also revealed that the defendant and his accomplice had nearly left the residence by way of the kitchen and then returned to the living room and bedroom where the killings took place.
>
> 3. The evidence shows that the victims were completely unaware that the defendant and his accomplice were inside the residence when they arrived at their home. Thus, the victims were not partici-

pants in nor did they consent to the defendant's conduct.

4. Juvenile proceedings have been instituted against the defendant's accomplice for his participation in these crimes. In his confession the defendant stated that he, the defendant, stabbed both of the victims. Thus, the defendant's participation in the murders was not minor.

5. There was no evidence that the defendant was under substantial domination of another person.

6. The defendant did not file a plea of insanity nor did he file a plea alleging lack of comprehension. In his confession the defendant stated that he had consumed a small quantity of controlled substances on the day of the murders and that he was high. The testimony of witnesses detailing the defendant's actions shortly after the killings show that his thinking was clear and was well aware of what had occurred. The evidence fails to substantiate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired as a result of mental disease or defect or of intoxication.

7. As to any other circumstances appropriate for consideration the only other circumstance which might be considered is the defendant's age of 18 years. This is not necessarily to be considered as a mitigating circumstance, particularly in view of the obvious torture inflicted upon at least one of the victims prior to the final fatal blow. The capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance.

In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstances of no significant history of prior criminal conduct. Accordingly, the court finds the jury recommendation to be proper and lawful and that the Court has a duty to follow such recommendation.

DATED: August 21, 1981.

Edward C. Theobald, Judge
Superior Court of Knox County"

There is no direct statement here that the sentencing judge was persuaded beyond a reasonable doubt that the defendant is guilty of felony murder and at the time of such offense intentionally killed one of the victims, the elements of the aggravating circumstance relied upon by the State, Ind. Code § 35-50-2-9(b)(1). Instead, this record shows a review of the evidence supporting the existence of the aggravating circumstance. There is no dealing with that evidence as a trier of fact. It may be that this has occurred again because of the lack of precision in the language of the statute. Cf. Schiro v. State, supra. It may be because the trial and

sentencing process in a capital case has become too complicated and demanding. Whatever the difficulty, this Court should stand firm and require a clear demonstration that the essential operations of the death sentencing process have taken place. I find no such demonstration here, and therefore must vote to set aside the penalty of death. I do not, however, find legal or constitutional grounds for reversal and therefore vote to affirm the conviction.

Prentice, J., concurs.

APPENDIX "B"

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. [illegible] and #282S67

[illegible] v.

[illegible]

You are hereby notified that the Supreme Court

has on this day Appellant's Petition for Rehearing is hereby DENIED, without opinion. Givan, C. J. DeBruler and Prentice, JJ., vote to grant Appellant's Petition for Rehearing having been DENIED, the Motion for Stay of Execution is now moot. It is therefore DENIED. Givan, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this [illegible] day of November, 19 83

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX "C"

STATE OF INDIANA

vs. CAUSE NO. SCR81-17

RICHARD DILLON

ENTRY

Entry

The court now enters findings and reasons for the imposition of the death penalty as recommended by the jury in this case as follows:

The defendant, Richard Dillon, was found guilty of the killings of William Hilborn and Mary Hilborn during the commission of a burglary in the guilt determination stage of the trial.

At the sentencing hearing, the burden was upon the State of Indiana to prove beyond a reasonable doubt that the murders were intentional and committed during the perpetration of a burglary as set forth in Counts VII and VIII of the charging information. The State moved to incorporate by reference the testimony presented in the first stage of the trial, which motion was granted. The testimony showed that the defendant and another broke and entered the Hilborn residence with the intent to commit the felony of theft. While the defendant and his cohort were inside the residence in the process of committing the burglary, William and Mary Hilborn returned to their home. The defendant and his accomplice, while in hiding inside the house, determined that it would be necessary to kill both William and Mary Hilborn in order to escape criminal prosecution and then carried out that plan. Accordingly, the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder.

In reviewing the seven possible mitigating circumstances considered by the jury, the court finds:

1. The defendant had no significant history of prior criminal conduct. This is a mitigating circumstance which must be weighed against the aggravating circumstances.

2. There was no evidence that the defendant was under extreme mental or emotional disturbance when he committed the murders. The defendant's confession revealed that he was somewhat fearful of being apprehended for the burglary, however, that same confession also revealed that the defendant and his accomplice had nearly left the residence by way of the kitchen and then returned to the living room and bedroom where the killings took place.

3. The evidence shows that the victims were completely unaware that the defendant and his accomplice were inside the residence when they arrived at their home. Thus, the victims were not participants in nor did they consent to the defendant's conduct.

4. Juvenile proceedings have been instituted against the defendant's accomplice for his participation in these crimes. In his confession the defendant stated that he, the defendant, stabbed both of the victims. Thus, the defendant's participation in the murders was not minor.

5. There was no evidence that the defendant was under substantial domination of another person.

6. The defendant did not file a plea of insanity nor did he file a plea alleging lack of comprehension. In his confession the defendant stated that he had consumed a small quantity of controlled substances on the day of the murders and that he was high. The testimony of witnesses detailing the defendant's actions shortly after the killings show that his thinking was clear and was well aware of what had occurred. The evidence fails to substantiate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired as a result of mental disease or defect or of intoxication.

7. As to any other circumstances appropriate for consideration the only other circumstance which might be considered is the defendant age of 18 years. This is not necessarily to be considered as a mitigating circumstance, particularly in view of the obvious torture

inflicted upon at least one of the victims prior to the final fatal blow. The capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance.

In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstance of no significant history of prior criminal conduct. Accordingly, the court finds the jury recommendation to be proper and lawful and that the court has a duty to follow such recommendation.

DATED: August 21, 1981

Edward C. Theobald

Edward C. Theobald, Judge
Superior Court of Knox County

35-50-2-9. Death sentences. — (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty [20] or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

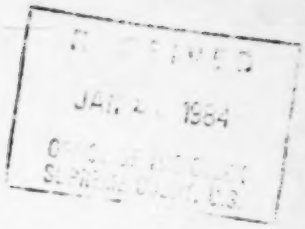
(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122; P.L.336-1983, § 1.]

IN THE SUPREME COURT OF THE
UNITED STATES



OCTOBER TERM, 1984

83-6136

RICHARD DILLON,
Appellant

v.

STATE OF INDIANA,
Appellee

ON APPEAL FROM THE SUPREME COURT OF INDIANA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

RICHARD DILLON,
Appellant

v.

STATE OF INDIANA,
Appellee

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, Richard Dillon, moves the Court for an Order permitting him to proceed in this Court, In Forma Pauperis, with his appeal from the judgment of the Supreme Court of the State of Indiana entered in this cause on October 3, 1983, pursuant to the provisions of Title 28, United State Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said Appellant.

Appellant's Petition for Writ of Certiorari is being filed contemporaneously with this Motion and Appellant's Affidavit.

LYTTON AND RIPSTRA

STEVEN E. RIPSTRA
Counsel for Appellant

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PROOF OF MAILING-AFFIDAVIT

I, Steven E. Ripstra, one of the attorneys for Richard Dillon, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 16th day of January, 1984, I deposited in a United States Post Office located at Jasper, Indiana, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States within the time allowed for filing, the foregoing Motion For Leave To Proceed In Forma Pauperis.

Steven E. Ripstra
STEVEN E. RIPSTRA

SUBSCRIBED AND SWORN to before me a Notary Public this 16th day of January, 1984.

Shirley Ann Daniels
NOTARY PUBLIC

My Commission Expires:
2-9-84

IN THE SUPREME COURT OF THE
UNITED STATES

---TERM, 198 ---

RICHARD DILLON,
Appellant

v.

STATE OF INDIANA
Appellee

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AND APPEAL IN FORMA PAUPERIS

I, Richard Dillon, being first duly sworn, depose and say that I am the Appellant, in the above-entitled case; that in support of my Motion To Proceed On Appeal without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1. That I was denied effective assistance of counsel at the trial stage of my capital murder case.

2. That I was denied the due process protection of the fourth and fourteenth amendments to the Constitution when statements I had made to the police were entered into evidence in my criminal trial.

3. That the Indiana Death Penalty Statute, Indiana Code Section 35-50-2-9 (Burns 1978) violates due process and is unconstitutional both in its terms and application.

4. That my fifth and fourteenth amendment rights against self-incrimination were violated by the trial court.

5. That my fifth and fourteenth amendment rights against self-incrimination were violated under the Indiana Death Penalty Statute as set forth above.

6. That my right to due process of law was abridged in that there was no finding by the trial court, during the sentencing

portion of my capital murder trial, that I was guilty of felony murder, and that at the time of the offense I intentionally killed the victims, beyond a reasonable doubt, as required by the Constitution of the United States and by the Indiana Death Penalty Statute.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?
Answer: NO. I have been incarcerated in the Indiana State Prison since my original sentencing in August, 1981.

2. Have you received within the past 12 months any income from a business, profession, or other form of self employment, or in the form of rent payments, interest, dividends, or other source?
Answer: NO

3. Do you own any cash or checking or savings account?
Answer: NO

4. Do you own any real estate stocks, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing?

Answer: NO

5. List the persons who are dependant upon you for support and state your relationship to those persons.

Answer: NONE

The Knox Superior Court, Knox County, Indiana, appointed pauper counsel for purposes of my appeal on September 21, 1981. Subsequent to the disposition of said appeal by the Indiana Supreme Court, the Knox Superior Court, Knox County, Indiana, appointed pauper counsel to represent me in any further proceedings and appeals as may be appropriate in the discretion of said counsel. This being done on October 11, 1983. The firm of Lytton and Ripstra, Jasper, Indiana, was my appointed, pauper counsel below and remains my appointed, pauper counsel at the present time.

I understand that a false statement of answer to any questions in this Affidavit will subject me to the penalties for perjury.

State of Indiana)
County of La Porte) SS

Richard Dillon
RICHARD DILLON

SUBSCRIBED AND SWORN to before me a Notary Public this 29th day of December, 1983.

Thomas M. Roe
NOTARY PUBLIC - La Porte County

My Commission Expires:
November 13, 1987

Supreme Court, U.S.
FILED
FEB 17 1984
ALEXANDER L. STEVAS
CLERK

No: 83-6136

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD DILLON,

Petitioner

V.

STATE OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD DILLON,

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Statement of the Case	1
Statement of the Issues	4
Summary of the Argument	5
Reasons for Denial of the Writ:	
I. PETITIONER WAS NOT DENIED ADEQUATE REPRESENTATION OF COUNSEL	6
II. PETITIONER'S INCULPATORY STATEMENT WAS PROPERLY ADMITTED	12
III. THE INDIANA STATUTE DOES NOT VIOLATE A DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION	16
IV. THE TRIAL COURT'S FINDINGS WERE NOT INSUFFICIENT	19
Conclusion	20

TABLE OF AUTHORITIES

Cases:	Pages:
Brinkley v. Lefevre, (1980, 2nd Cir.) 621 F.2d 45, cert. denied, ___ U.S. ___, 101 S.Ct. 203, 66 L.Ed.2d 87	7
Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975)	18
Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)	7,8
Dukes v. Warden, 406 U.S. 250, 92 S.Ct. 1551, 32 L.Ed.2d 45 (1972)	8
Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824	13
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	6
Hollon v. State, ___ Ind. ___, 398 N.E.2d 1273	7,9
Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981)	9,10
Marzullo v. Maryland, (4th Cir. 1978),572 F.2d 57, cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394	7
McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)	6
Reina v. United States, 364 U.S. 507, 81 S.Ct. 260 (1960)	17
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983)	10,11
Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973)	6,8
United State v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	13, 14,15
United States ex rel. Heral v. Franzen, (1981, 7th Cir.) 667 F.2d 633	7
United States ex rel. Williams v. Twomey, (1975, 7th Cir.) 511 F.2d 634	7
United States v. Fleming, (1979, 7th Cir.) 594 F.2d 598, cert. denied 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.2d 299 (1979)	7
Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982)	10
Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, ___ L.Ed.2d ___ (1983)	18
Statute:	
IC § 35-50-2-9	16,19
Other:	
Ga. Code Ann. §§ 27-2503	18

No: 83-6136

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD DILLON,

Petitioner

V.

STATE OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that court in Cause No. 282 S 67.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 454 N.E.2d 845 and may be found in Petitioner's Brief as Appendix "A".

STATEMENT OF THE CASE

Petitioner was charged by information and convicted of Burglary, Conspiracy, and two Counts of Murder, and by information the state charged the statutory aggravating circumstances of knowing and intentional killing in the course of the enumerated felony of burglary, and of committing more than one murder.

The facts of the crime were that Dillon and another planned to break into the home of an elderly couple, William and Mary Hilborn, because they had heard that the victims kept a large amount of money in their home. Dillon and his accomplice broke into the home with the intention of stealing the money. While they were in the home, Mr. and Mrs. Hilborn returned. Dillon and his accomplice hid, and although they had an opportunity to leave the house before committing the murders, decided it would be advisable to kill the couple to prevent their being witnesses. The killing was committed by

Petitioner, who stabbed the old couple several times. Mrs. Hilborn was slashed in several places on her neck and hands in an effort to torture her into revealing where the money was kept. The evidence showed that Mr. Hilborn struggled with Dillon and tried to defend himself with a club. He had a severe wound in the abdomen, and apparently received a fatal wound in his heart while attempting to go to the aid of his wife. Mrs. Hilborn died of a severe stab wound in the stomach and a fatal stab wound in her back. Although the victims were known to have recently cashed their monthly retirement checks a few days earlier, there was no money found in the house.

One of Petitioner's issues concerns the taking of his incriminating statement. The facts regarding the taking of that statement were as follows:

Petitioner made a statement to a detective on March 8, 1981, which another investigator felt was incorrect. A police officer had seen Petitioner near the scene of the murders, and Petitioner was considered to be a potential witness, not a suspect. An investigator went to Petitioner's house and said they wanted to talk to him. He informed Petitioner that he did not have to go to the station if he did not want to. Petitioner agreed to go. He was not handcuffed.

Petitioner taped a statement. The investigators concluded that statement was not truthful. Petitioner was advised that they were discussing the crime of murder but the ultimate charge brought would be up to the prosecutor. Petitioner asked that the prosecutor be contacted so he could know the charges he was facing. The prosecutor was contacted. Before the prosecutor could get to the sheriff's office, Petitioner said to an officer, "Hell, we did it," and started crying.

Petitioner then agreed to give another statement. He was advised of his rights and signed a waiver of rights form, an then gave a statement. He was twice advised that he could have a lawyer present, but explicitly declined to have a lawyer come.

The officers made no promises or threats and there was no physical coercion. The whole process took around two and a half hours, and occurred in an unlocked office with comfortable furniture. Petitioner was not put in the jail portion of the building. He did not ask for food, but was given a soft drink. Petitioner was formally arrested after giving the second statement.

Petitioner claims to have smoked some marijuana and consumed two Quaaludes on the date of the statement. The officers testified that Petitioner did not seem to be under the influence of drugs at the time.

Petitioner also alleges incompetent representation of counsel. Trial counsel himself had alleged to the trial court and in post-trial proceedings stated in an affidavit reasons why he felt his representation of Petitioner was incompetent. He stated that the incompetent representation was due to his inability to prepare adequately, and cited three personal matters as the basis for this inadequacy: His recent divorce, the injury of his brother, and the imminent death of his father. He alleged that he reviewed the case with defendant for less than four hours from the time of the arrest to the trial.

These allegations are repeated in the instant Petition. Petitioner also alleges that the trial counsel failed to submit any proposed final instructions to the court.

The record shows the following facts as to these allegations:

A hearing was held on the counsel's motion for continuance based on these factors, and defendant was asked if he wished counsel to withdraw. Defendant answered that he was aware of the circumstances but that he did not wish the attorney to withdraw. Counsel's wife had filed for divorce one month before counsel entered his appearance in the case, and the divorce was final eighty-nine days before trial. The father's illness had been long-standing, and his death did not occur until forty-seven days after trial began. The record

also shows that Petitioner's trial counsel prepared and tendered to the court eleven proposed preliminary instructions, but these were either withdrawn or refused as covered by the court's own instructions.

The record shows that during the trial preparation phase of this case counsel had numerous meetings to consult with the prosecuting attorney prior to trial, sought and obtained a change of venue, interviewed witnesses, subpoenaed and presented witnesses on Petitioner's behalf, requested and received full discovery before trial and viewed all the State's physical evidence, read and copied the grand jury testimony, filed an alibi notice and presented evidence on the alibi defense, filed a writ of habeas corpus, filed and argued a motion to suppress the confession, conducted cross-examination, attended omnibus hearings, viewed the list of prospective jurors, and consulted with co-defendant's attorney. Counsel visited the Pike Count jail ten to fifteen times during the 27 days Petitioner was confined there, and conferred with Petitioner on four occasions in the Court's jury room for periods of forty to sixty minutes each.

Defendant was convicted of all four counts, and after a separate penalty phase hearing, the jury recommended the death penalty. The trial court imposed the death penalty and announced his reasons therefore in written findings. Petitioner pursued his direct appeal to the Indiana Supreme Court, which affirmed his conviction.

Petitioner filed his Petition for Certiorari in this Court on January 20, 1984. Petitioner also filed a motion for leave to proceed in forma pauperis, and submitted his petition in the form permitted by this Court's rules for pauper petitions.

STATEMENT OF ISSUES PRESENT FOR REVIEW

The Petitioner raises four issues as reasons for granting the writ. In the order he presents them, they are:

1. Whether he received inadequate assistance of counsel at trial.

2. Whether the circumstances of giving his inculpatory statement were such that the statement should have been excluded as the product of an involuntary custodial interrogation.

3. Whether it is impermissible in the penalty phase to allow the introduction, over objection, of defendant's own testimony in the guilt phase of his trial.

4. Whether the trial court's written findings were inadequate as failing to include his specific finding that the statutory aggravating circumstance was proved beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

I. A trial counsel's assertion of incompetent representation should not be treated as conclusory on a Sixth Amendment allegation. Instead, an appellate court should consider the totality of the circumstances of representation as shown by the record and determine if a defendant's representation was within the range of competence demanded of attorneys in such a criminal case. Despite some personal difficulties which befell counsel, the record does not show that counsel's performance fell below that range.

II. The totality of the circumstances shows that Petitioner voluntarily accompanied police officers to the police station for purposes of discussing a statement and knew he did not have to go with them. Thus, the inculpatory statement he made was not a result of an illegal arrest, and was properly not excluded.

III. Once a verdict of guilty has occurred at a trial, no further incrimination can occur. Thus, the fact finder's use in a subsequent sentencing phase of defendant's testimony as part of the guilt-phase evidence does not infringe the right against involuntary self-incrimination.

IV. The trial court's written finding, contrary to Petitioner's contentions, did find beyond a reasonable doubt the existence of two statutory aggravating circumstances.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS NOT DENIED ADEQUATE REPRESENTATION OF COUNSEL

Petitioner predicates his grounds of inadequate representation of counsel on two cases: that trial counsel himself introduced an affidavit stating that he was incompetent, and that counsel did not tender final instructions or object to the instructions which were delivered by the court. Appellant does not suggest any manner in which the court's instructions were incomplete or erroneous, nor does he suggest what instructions the trial counsel should have made. He also alleges in a general manner that the counsel did not adequately prepare for trial, but does not state any particular action or inaction occurring at trial as a result of that alleged lack of adequate preparation.

Since Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) it has been clear that the Sixth Amendment's provision that accused in all criminal prosecutions shall enjoy the right to the assistance of counsel for his defense applies to the state courts through the Fourteenth Amendment. In the context of evaluating guilty pleas, this Court had made it clear that this guarantee might be shown to have been violated where a prisoner shows that his attorney's advice is not "within the range of competence demanded of attorneys in criminal cases", McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235.

It has fallen to lower federal courts and state courts to articulate what the "range of competence" is that is "demanded of attorneys in criminal cases." Several Federal Circuit Courts of Appeal have retained as a standard that to show

incompetence a defendant must show that the level of representation was such to render the trial a "farce or mockery" or a "sham". E.g. Brinkley v. Lefevre, (1980, 2nd Cir.) 621 F.2d 45, cert. denied, ___ U.S. ___, 101 S.Ct. 203, 66 L.Ed.2d 87; Marzullo v. Maryland, (4th Cir. 1978), 572 F.2d 57, cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394. Indiana's Federal Circuit has held that the Constitution guarantees a defendant legal assistance which meets a "minimum level of professional representation". This holding was in a decision which stated that the court's inquiry goes beyond the question whether the state court trial had been a sham or mockery, United States ex rel. Williams v. Twomey, (1975, 7th Cir.) 511 F.2d 634; an inquiry which requires an examination of "the totality of circumstances in the particular case." United States ex rel. Heral v. Franzen, (1981, 7th Cir.) 667 F.2d 633.

The burden of showing ineffective representation is on the defendant. United States v. Fleming, (1979, 7th Cir.) 594 F.2d 598, cert. denied 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.2d 299 (1979).

Indiana's Supreme Court has, of course, followed the requirements of the Seventh Circuit. It has stated that its standard of "farce and mockery" had been "modified by the standard of adequate legal representation", see the decision in this case (454 N.E.2d 845); also Hollon v. State, ___ Ind. ___, 398 N.E.2d 1273.

The issue is whether the trial counsel's affidavit, unsupported by any instances of specific failure at trial, and demonstration of a decision not to render final instructions, without an allegation of any harm resulting, can meet the Petitioner's burden of showing that his trial counsel was inadequate.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) this Court dealt with the issue of effective representation of counsel in the context of a claim of

conflict of interest arising from a situation of joint representation. In that case it was held:

> But until a defendant show that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance [citations omitted]
>
> * * *
>
> In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

446 U.S. 350, 100 S.Ct. 1719.

Cuyler cited the earlier case of Dukes v. Warden, 406 U.S. 250, 92 S.Ct. 1551, 32 L.Ed.2d 45 (1972), also a conflict in representation case, which had held that where defendant did not identify an actual lapse in representation, denial of a writ for habeas corpus was affirmed.

The Cuyler case principle, that a petitioner must demonstrate the actual failure in his criminal trial representation to be entitled to relief from this court, should apply in general to allegations of incompetent representation of counsel.

The Indiana Supreme Court's holding in the instant case was an expression of the Cuyler principle. It held that without a factual showing of instances in which the personal problems which the trial counsel had endured during this period of time, and without a demonstration that the trial court's instructions were such as to require objections or supplementation by tendered instructions, it would not find incompetence.

(Petitioner cites Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) for the proposition that this Court "held that the advice of an attorney to not submit instructions may be 'outside the "range of competence demanded of attorneys in criminal cases".'" In fact, Tollett says nothing at all concerning a decision of counsel not to submit instructions. It is difficult to see how it could have, since the Tollett case involved a guilty plea and never reached a jury.)

The State court decision made it clear that an allegation of incompetence would be tested by consideration of the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial, even where the allegation of incompetence is made at trial and on appeal by counsel himself. In short, the Indiana Supreme Court has refused to hold that a defense counsel's affidavit of his own incompetence is conclusory on the issue of adequacy of representation or shifts the burden of proof on that issue; the court will, despite such a statement, inquire as to the actual preparation and conduct of the trial, and assess it according to the "mockery of justice test as modified by the adequate legal representation standard." 454 N.E.2d 845; Hollon v. State, ___ Ind. ___, 398 N.E.2d 1273.

Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981), cited by Petitioner, does not establish that any conclusions or lesser burden of showing inadequacy of trial representation is created by counsel's affidavit of his own incompetency. The facts, contrary to Petitioner's view, are not closely analogous. In Kemp, the Circuit Court did find incompetence where, inter alia, counsel filed such an affidavit. But in the Kemp case there was much more, including the fact that the murder trial involved was counsel's first unassisted criminal case; that counsel had failed to interview a single adverse witness, failed to call a single one of the character witnesses who were present in court at defendant's request, failed to investigate, failed to discuss possible defenses with the accused, and failed to offer a voluntary manslaughter instruction when the facts might have warranted such an instruction. In addition, he failed to adequately inform his client as to degrees of homicide and risks of proceeding to trial before rejecting on is client's behalf an offer of a plea on voluntary manslaughter. It is clear from the Fifth Circuit's decision in Kemp that their decision upholding habeas relief was based on these specific allegations of failure, supported by the record. Thus,

trial counsel's agreement that he was incompetent was just one of the factors considered. As the Kemp decision stated, the incompetent representation was determined "under the totality of these circumstances."

Appellant also cites Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) for a holding that "where preparation for a murder trial was not adequate, effective counsel is lacking", citing page 966 of that opinion for that principle. (Petition, page 5) Stanley does hold that "[w]ere trial counsel for a capital defendant to testify that he had no strategy whatever for the sentencing phase and that he failed to consider or develop possible mitigating evidence, then such counsel must be deemed ineffective." This holding, when read in light of the case it cited, Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) is clearly applicable to situations where counsel did not follow a certain line of investigation, and there were other plausible lines of defense that he did pursue. Then the inquiry is whether the abandonment of the one line of defense was made on a strategic basis. Where there actually is a choice of strategies, the counsel will be presumed to have made his choice on strategic grounds. But this presumption can be rebutted by counsel's credible testimony at an evidentiary hearing that his choice was not based on strategic grounds, or where his actions did not conform to a general pattern of rational trial strategy.

Thus, the Strickland case, cited by Stanley, still requires a factual showing of the failure of counsel to take certain specific actions before the presumption of his competence can be rebutted. The Strickland facts do not apply here, where Petitioner makes no claim as to any line of investigation that counsel is supposed to have neglected.

Going back to Stanley v. Zant, we note that the 11th Circuit reaffirmed the principles that:

> [A] petitioner asserting that counsel failed to conduct an adequate pretrial investigation has the initial burden of making a dual showing. As a threshold requirement,

> he must show that his counsel was in fact ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases" [citations omitted]. This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case.

697 F.2d at 958.

The alleged failure of defense counsel in Stanley was in not giving any mitigating evidence at the penalty phase of a capital trial. The Circuit Court reiterated that the petitioner's burden was "to show that his counsel was not rendering reasonably effective assistance given the totality of the circumstances." 697 F.2d at 962.

It is clear from the decision of the Supreme Court of Indiana in the instant case that it considered the totality of the circumstances, including the trial counsel's affidavit showing the personal reasons he felt his assistance was ineffective. We do not concede that that Court failed to give the actions of counsel, in the face of such a self-critical affidavit, a "critical look". In its opinion in this case, found in the Petition at page 16 and following, the Indiana Court cited at length the circumstances it considered. These obviously included the allegations of counsel's affidavit, for the court showed what the record indicated on each of these allegations. This included the rather broad time-frame that the personal misfortunes befell the counsel (he was sued for divorce, for instance, a month before appearing in this case, and the divorce was final eight-nine days before trial). The Indiana Court also cites many actions performed on Petitioner's behalf by counsel. These include interviewing witnesses prior to trial, obtaining a change of venue, obtaining discovery, and viewing all the State's evidence and copying the grand jury

testimony, consulting with the alleged accomplice's counsel, frequently conferring with defendant at length, presenting a partial alibi defense, attending numerous pretrial proceedings, subpoenaing and presenting witnesses in defendant's behalf, and conducting extensive cross-examination and lengthy closing arguments. The Indiana Court concluded that "[i]n fact, the record shows that defendant had vigorous representation in the face of overwhelming evidence, including his own confession, against him."

Therefore, we believe that the Indiana Supreme Court's determination, upon consideration of the totality of the circumstances of Petitioner's representation (not just on the granting of a short continuance and Petitioner's decision to continue being represented by the counsel despite his pre-trial motion for withdrawal or continuance) was correct, and that no basis is shown on this issue for granting the writ.

II.

PETITIONER'S INCULPATORY
STATEMENT WAS PROPERLY ADMITTED

Petitioner asserts as grounds for relief that the trial court admitted into evidence a statement he made that he contends was the product of an unlawful detention.

The facts are that following a prior statement, police learned that defendant may have been near the scene and they wished to ask Petitioner some questions. Two officers went to his home and had Petitioner's brother call him over. The officers identified themselves and said they wanted to talk to Petitioner. They asked if he would come to the police station to talk about his prior statement concerning the day of the murder. He said "Sure", got a jacket from his room, and rode in the back of the police car (alone and not handcuffed). The officers specifically told the Petitioner that he did not have to come with them if he didn't want to, but he agreed to go with them.

The conversation occurred not in the jail portion of the police office, but in the sheriff's office, a room with

comfortable chairs. He signed a rights waiver form. He made a taped statement. After looking over the statement, the two officers told Petitioner they thought he was not truthful, and advised him they were discussing the crime of murder. The Petitioner asked to talk to the prosecutor. While one officer was calling the prosecutor, Petitioner looked at the other officer and said, "Hell, I did it." Petitioner was again advised of his rights, signed a second waiver of rights form, and gave the statement admitting his part in the murders. The whole period of questioning took two and a half hours. Defendant was free to leave at any time. The doors to the office were unlocked. He was never threatened or abused, and no promises of leniency were given. He did not ask for food. He was given a soft drink.

Petitioner seeks to compare this case to the facts in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824. In Dunaway, without probable cause, policemen had been ordered to "pick up" defendant. They found him in a neighbor's house and took him into custody. Although he was not told he was under arrest, he would have been restrained if he attempted to leave. Dunaway was never told that he was free to go.

In United State v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) a plurality of this court held that a person is "seized" only when, "by means of physical force or a show of authority, his freedom of movement is restrained." 446 U.S. at 553, 100 S.Ct. at 1877. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification," the plurality went on to say. Id. (The above principles were not disagreed with by the three Justices who concurred in he judgment; They did not occur in the finding that Mendenhall reasonably could have though she was free to walk away when asked for her driver's license and ticket. Thus, the fact that three justices did not

concur in this part of the plurality opinion did not necessarily imply disagreement with the views expressed therein. Concurring opinion of Justice Powell, 446 U.S. at 561, 100 S.Ct. at 1880, note 1.)

Mendenhall involved an airport stop of a person whose behavior "profile" matched that expected of a drug courier. It first discussed the consequences of her being stopped and questioned in the airport concourse; that is, without her having been taken anywhere. After that, Mendenhall was asked if she would go to the airport drug enforcement agency office, and she went with them, although not verbally assenting to that request. While in the office, she was asked to consent to a search, and informed that she had a right to decline the search if she desired. She responded "Go ahead."

The first question, then, was whether the trip to the office was an impermissible seizure of her person. This Court analyzed the question thus:

> The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances. Schneckloth v. Bustamonte, 412 U.S. at 227, 93 S.Ct. at 2047, and is a matter of which the Government has the burden of proving. Id. at 222, 93 S.Ct. at 2045, citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797. ... The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

446 U.S. at 558-559, 100 S.Ct. at 1879. (This citation is found in part IIB. of the plurality opinion, in which the three Justices who only concurred in the results of part IIA joined. 446 U.S. 547, 100 S.Ct. 1873, note **.)

The Court held that the factors of her being a young black woman of limited education and thus feeling intimidated by the older, white, male officers were not irrelevant, but not

decisive, either, and concluded that the totality of the evidence was plainly adequate to support the lower court's ruling that Mendenhall voluntarily consented to accompany the officers to the DEA office.

Thus, this Court held, her subsequent consent to the search could not be contended to have been "infected by an unlawful detention". The other facts of the search, including being twice warned that she need not consent to it, represented "more than enough evidence" that her consent to search was voluntary. 446 U.S. at 559, 100 S.Ct. at 1879.

Here, Petitioner seeks to invalidate his twice-given execution of rights waiver forms, which were preceded by requisite warnings and advisements of rights and waivers, by showing that this consent was similarly "infected by an unlawful detention."

In fact, there is much more reason to conclude that he accompanied the officers voluntarily, and reasonably thought he was free to leave, than in the Mendenhall case. Petitioner had already given the police a prior voluntary statement, and was permitted to leave on that occasion. He was expressly told that he need not go to the sheriff's office with the policemen. He received all required advisements of rights and executed a waiver. He made a statement. Then, when it became apparent to him that the officers believed he was untruthful, he gave up the pretense. While the officers were responding to his request to talk to the prosecutor, he suddenly volunteered that he had done it. Before giving the next statement, he was again fully advised and gave his waiver of rights again.

There was no illegal detention in this case. The facts clearly support the trial court's and Indiana Supreme Court's conclusions that he voluntarily accompanied the police downtown with full knowledge that he need not do so. The facts show nothing intervened to render that statement the product of

an illegal custodial interrogation. There is no basis shown for granting the writ on the allegation of illegal seizure or involuntariness of the statement.

III.

THE INDIANA STATUTE DOES NOT VIOLATE A DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION

As is the case with many States' capital punishment statutes, Indiana's procedure is divided into two phases: a guilt-determination phase, and a sentencing proceeding. In the sentencing procedure, the same jury which convicted a defendant hears evidence and makes a unanimous advisory recommendation to the judge. The statute provides that "[t]he jury, or the court [if the guilt phase was a bench trial] may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence ...." IC 35-50-2-9(d).

Petitioner now seeks relief on a Fifth Amendment claim flowing from this statute. He voluntarily took the witness stand and testified in the guilt phase, thus waiving his right against self-incrimination. He contends that such waiver was effective only as to the guilt phase, and that the evidence given in his own testimony then should not have been admitted for consideration by the sentencer in the sentencing proceedings.

He ultimately decided to testify at the penalty phase but says now that this decision was "arguably" made only upon the trial court's granting of the State's motion to incorporate all trial evidence in the sentencing hearing. In making this assertion he seems to be contending that his decision to testify at sentencing should not be treated as a waiver of a right against self-incrimination at the sentencing hearing. However, we must note that neither in his direct appellate brief nor in

this petition does Petitioner allege that he ever actually objected to the State's motion to incorporate the guilt-phase evidence in the sentencing hearing or direct us to such an objection in the record.

Put more briefly, he contends that his right against self-incrimination was impermissibly infringed when his voluntary testimony from the guilt phase was ordered incorporated into the punishment phase evidence, because the guilt phase testimony contained his own testimony.

There is some novelty in this assertion, which is shown by the fact that Petitioner's only authority in this respect is to Reina v. United States, 364 U.S. 507, 81 S.Ct. 260 (1960), which he characterizes as holding as a general principle that the "constitutional protection no longer attaches after an accused testifies because the accused can no longer be incriminated by the former testimony." (Petition, p. 10). Actually, the Reina case notes that the petitioner therein had said the "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime ***." 364 U.S. at 512, 81 S.Ct. at 264, emphasis added. (The Court concluded that Mr. Reina's assertion was backed by "weighty authority." Reina also noted that the Fifth Amendment did not protect a Federal witness from answering questions which might incriminate him under state law.)

Thus, he is not claiming that anyone forced him to abandon his right against self-incrimination in the guilt phase. He claims only that the consideration at the guilt trial whether or not to waive the privilege is burdened by the knowledge that the waiver will cause that evidence to be admitted in the sentencing phase.

This entire argument loses sight of an important factor. The sentencing hearing is simply a continuation of the same proceeding. It is no more a separate trial of guilt than

is the sentencing hearing in any non-capital case. The fact-finder's entire capacity to convict a defendant as to the crimes charged is already expended upon its verdict on guilt or innocence. On sentencing hearing the fact-finder does not determine guilt. Therefore, Petitioner is incorrect in his assertion that the use of the already-admitted evidence could possibly have any further incriminating effect. Since the earlier-phase testimony is not being used to find guilt, use of that testimony for a sentencing purpose does not involve self-incrimination.

In Gregg v. Georgia, supra, this court approved a capital sentencing statute which among other things provided a separate sentencing hearing in which evidence considered during the guilt stage could be considered during the sentencing phase without being resubmitted. 428 U.S. at 165, 96 S.Ct. at 2921; Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975). Gregg, of course, upheld the constitutionality of this scheme.

In addition, the Georgia statute permits the introduction in the sentencing phase of "the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant". Ga. Code Ann. §§ 27-2503. A plea of guilty, of course, operate as a waiver of the right against self-incrimination. Thus, the Georgia statute permits not only the introduction of any self-incriminatory testimony the defendant may have elected to make at the guilt phase, but all waivers of self-incrimination that the defendant may ever have made in connection with a guilty plea. This provision of the Georgia statute was specifically upheld by this court in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, ___ L.Ed.2d ___ (1983).

The Court has stated as a general principle that "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Gregg, 428 U.S. at 203-204, 96 S.Ct. at 2939. This principle flows logically from the overriding concern expressed by this court in Gregg, that capital punishment determinations should be made based on an individialized determination of the nature

of the crime and the nature of the offender. These principles would seem to permit, if not compel, the sentencer to have before it all the facts adduced at the trial of guilt for the crime, including the testimony of the accused, should he freely decide to give it.

Thus, we believe that no constitutional violation has resulted from the trial court's admission of defendant's voluntary guilt-phase testimony into the later stage of the trial, and that petitioner is entitled to no relief as a result of that decision.

IV.

THE TRIAL COURT'S FINDINGS WERE NOT INSUFFICIENT

Petitioner's final contention is that the trial judge's findings were inadequate to support imposition of the death penalty. His basis for this claim is his view that the trial court judge did not directly state that he found the existence of any aggravating circumstance beyond a reasonable doubt.

The trial court specifically found that "the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder." These were the only two aggravating circumstances alleged by the State.

The trial court went on the state specifically:

> In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstance ...

The Indiana Supreme Court, in reviewing this sentence, found that these findings were in accordance with the statute, IC § 35-50-2-9.

In fact, these findings do explicitly state that the court finds that aggravating circumstances exist, and what they are, and discusses the evidence the court relied upon in reaching that conclusion.

The requirement of Gregg and Proffitt that there be written findings of a trial court is in order to permit adequate appellate review of the sentence; for the appellate court to know on what basis the judge aggravated the sentence, and what facts supported the judge in so doing. The opinion of the trial court judge clearly stated what aggravating circumstances were proven, that they were proven beyond a reasonable doubt, and what the evidence was to support that finding. The Indiana Supreme Court concluded that this finding was adequate to allow it to review the sentence.

Thus, this court's requirements regarding findings of trial courts in capital cases have been met, and no reason is shown to grant relief on this issue.

CONCLUSION

Wherefore, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformeter with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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